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parties in the case and its use in other cases is limited. R.1:36-3.

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-0290-15T2

ROBERT KUSZNIKOW,

Appellant,

v.

NEW JERSEY DEPARTMENT OF
CORRECTIONS,

Respondent.

Submitted October 11, 2016 – Decided January 26, 2017

Before Judges Guadagno and Suter.

On appeal from the New Jersey Department of
Corrections.

Bahuriak Law Group, attorneys for appellant
(Joseph D. Rutala, on the brief).

Christopher S. Porrino, Attorney General,
attorney for respondent (Lisa A. Puglisi,
Assistant Attorney General, of counsel;
Matthew Lynch, Deputy Attorney General, on
the brief).

PER CURIAM

Robert Kusznirow, currently an inmate at Northern State
Prison in Newark, appeals from the August 5, 2015 final agency

decision of respondent New Jersey Department of Corrections (DOC), upholding the guilty determination and sanctions imposed for committing prohibited act *.005, threatening another with bodily harm or with any offense against his or her person or his or her property, in violation of N.J.A.C. 10A:4-4.1(a)(2)(ii). Following our review of the arguments advanced on appeal, in light of the record and applicable law, we affirm.

Prior to his transfer to Northern State, Kusznirow was serving his term at Southern State Correctional Facility. (SSCF). On the morning of July 29, 2015, SSCF Senior Corrections Officer Heaton told Kusznirow that he had been reassigned from housing in Compound A, to a different housing unit in Compound B. Kusznirow told Heaton, "I don't want to be here. Who do I have to punch in the mouth to get where I have to be?" As Kusznirow spoke, Heaton noticed he appeared to be agitated and was clenching his left fist.

In addition to the previously referenced charge, Kusznirow was charged with prohibited act .254, refusing to work, or to accept a housing assignment. Kusznirow pled not guilty and his request for the assignment of a counsel substitute was granted.

Hearing Officer DiBenedetto conducted a disciplinary hearing on July 31, 2015. At the hearing, Kusznirow testified and denied making the statement to Heaton. He also claimed that

he had filed a complaint against an officer assigned to Compound B and did not feel he should be assigned there. Kusznirow's counsel substitute requested leniency. Relying on Heaton's report, H.O. DiBenedetto found Kusznirow guilty of prohibited act *.005. She found no evidence to discredit Heaton's statement and sanctioned Kusznirow with loss of 180 days commutation time, 15 days in administrative detention, and 180 days administrative segregation. Kusznirow appealed and Associate Administrator Erin Nardelli upheld the hearing officer's decision.

On appeal, Kusznirow now concedes that he made the statement to Heaton, but argues that it was not a threat:

THE HEARING OFFICERS FINDING IS NOT SUPPORTED BY SUBSTANTIAL EVIDENCE BECAUSE MR. KUSZNIKOW'S STATEMENT CANNOT BE SEEN AS A THREAT SINCE THERE IS NO IDENTIFIABLE VICTIM AND THE CIRCUMSTANCES ARE NOT SUCH THAT HIS CONDUCT WOULD CONVEY FEAR TO A REASONABLE OBJECTIVE PERSON.

Our review of agency action is limited. Ordinarily, we will reverse the decision of the administrative agency only if it is "arbitrary, capricious or unreasonable or it is not supported by substantial credible evidence in the record as a whole." Henry v. Rahway State Prison, 81 N.J. 571, 579-80 (1980) (quoting Campbell v. Dep't of Civil Serv., 39 N.J. 556, 562 (1963)). "It is settled that '[a]n administrative agency's

interpretation of statutes and regulations within its implementing and enforcing responsibility is ordinarily entitled to our deference.'" Wnuck v. N.J. Div. of Motor Vehicles, 337 N.J. Super. 52, 56 (App. Div. 2001) (quoting In re Appeal by Progressive Cas. Ins. Co., 307 N.J. Super. 93, 102 (App. Div. 1997)). We have recognized that the Legislature has provided for the broad exercise of the DOC's discretion in all matters regarding the administration of a prison facility. Russo v. N.J. Dep't of Corr., 324 N.J. Super. 576, 583 (App. Div. 1999).

Kusznikow argues that his statement was not a threat as it was not directed at anyone specifically; he merely asked Heaton who he had to punch in the mouth to get what he wanted. Kusznikow notes that prohibited act *.005 proscribes "threatening another with bodily harm or with any offense against his or her person or his or her property." N.J.A.C. 10A:4-4.1(a)(2)(ii). Kusznikow suggests that his statement is merely a benign inquiry, asking Heaton to identify someone he could assault in order to obtain preferred housing. While this argument is creative, it lacks merit.


In Jacobs v. Stephens, 139 N.J. 212 (1995), the Court held that an inmate's statement to a corrections officer "'to get the fuck out of [my] face' during a 'heated' discussion" was sufficient on its own to find that a threat had been made. Id.

at 223 (alteration in original). The Court held that "[t]he determination of whether a remark constitutes a threat is made on the basis of an objective analysis of whether the remark conveys a basis for fear." Id. at 222.

Kusznikow's statement made while clenching his fist was a clear indication that he intended to assault someone in order to get his requested housing assignment. We are satisfied that there was sufficient evidence in the record to support the hearing officer's finding of a threat.

Affirmed.

I hereby certify that the foregoing
is a true copy of the original on
file in my office.


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